UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HEALTHY MINDS, INC.

and Case 15-CA-231767

KIMBERLY R. DEFRESE-REESE, an Individual

Nariea Nelson, and *William Hearn, Esqs*., for the General Counsel
Dr. Angela Nichols, Bossier City, LA, for the Respondent *Pro Se*

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried by remote Zoom technology on November 5, 2020. The complaint alleges that the Respondent, Healthy Minds, Inc., violated Section 8(a)(1) of the National Labor Relations Act (the Act)[1] by: (1) interrogating employees on July 25, 2018[2] about their protected concerted activities relating to wage and hour claims, and (2) discharging the charging party, Kimberly R. Defrese-Reese (Reese), because she engaged in such activity. The Respondent denied the charges, including the allegation that it has been engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At the outset of the hearing, the General Counsel moved for adverse inferences to be drawn on the ground that the Respondent failed to comply with its subpoena duces tecum requesting the production of numerous company records. The Respondent did not seek to revoke the subpoena prior to the hearing. Instead, the Respondent merely replied at the hearing that it was unable to produce the records because it sold the business to Seaside Healthcare on August 1, 2019 and no longer possessed them. The Respondent explained that the documents would be in Seaside Healthcare's possession but provided no further information.[3] However, the Respondent then proceeded to introduce evidence of records that would have fallen within the scope of the subpoena – telephone expenses, Reese's unemployment insurance benefits determination, Reese's pay adjustment history, and emails. That production demonstrated that

[1] 29 U.S.C. § 151-169.

[2] Add dates are in 2018 unless otherwise stated.

[3] The subpoena requested, in pertinent part: "If any document responsive to any request herein was, but no longer is, in Respondent's possession, custody or control, identify the document (stating its date, author, subject, recipients and intended recipients); explain the circumstances by which the document ceased to be in your possession, custody or control; and identify (stating the person's name, title, business address and telephone number, and home address and telephone number) of all persons known or believed to have the document or a copy thereof in their possession, custody or control." (GC Exh. 2 at 3.)

there was more – the Respondent either possessed or had the ability to obtain the records responsive to the General Counsel's subpoena duces tecum. Although appearing *pro se* the Respondent clearly understood the process well enough to manipulate it. The Respondent's blatant disregard for the General Counsel's subpoena duces tecum, coupled with its presentation of selective evidence, warrants the application of inferences adverse to the Respondent's version of the facts where appropriate. *Bannon Mills,* 146 NLRB 611, 633-34 (1964).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits that, at the relevant times, it was a corporation with an office and place of business at 209 West Jefferson Avenue in Bastrop, Louisiana (Respondent's facility), and was engaged in providing mental health counseling services. It denies, however, that it was engaged in interstate commerce and contends that the Board lacks jurisdiction over it.

As a mental health counseling service, the Respondent classifies its operations as a health care institution pursuant to Section 2(14) of the Act. The Board's current standard for the assertion of jurisdiction over health care institutions[4] is an annual gross revenue of at least $250,000. *East Oakland Community Health Alliance. Inc.,* 218 NLRB 1270, 1271 (1975*)* (Board exercised jurisdiction over a family health clinic who received $263,783 in funds through federal revenue sharing). The Respondent easily surpasses that threshold by billing $170,000 to $200,000 per month to the federal Medicaid program. The Board recognizes Medicaid billings as transactions in interstate commerce because the payments come from the federal government and are transferred across state lines. See *Danville Nursing Home*, 254 NLRB 907, 908 (1981); *J.M. Abraham, M.D., P.C.*, 242 NLRB 839, 839 (1979); *Glen Manor Home for Jewish Aged v. NLRB*, 474 F.2d 1145, 1147 (6th Cir. 1973).[5] In addition, the Respondent purchased and received goods at its facility totaling approximately $8,700 per year from ADT Security, Sudenlink and DirecTV – all companies engaged in interstate commerce.[6] *Marty Levitt*, 171 NLRB 739 (1968) ($1500 in out-of-state activities "is more than *de minimis*); *Aurora City Lines, Inc.*, 130 NLRB 1137, 1138 (1961), enfd. 299 F.2d 229, 231 (7th Cir. 1962) (court upheld the Board's assertion of jurisdiction based on $2,000 of indirect inflow.

Accordingly, I find that the Respondent annually purchased and received goods at its facility valued in excess of $250,000, the minimum statutory amount for health care institutions,

[4] In the case of nursing homes, visiting nurse associations, and other related facilities, the Board requires minimum annual gross revenues of $100,000.

[5] Due to the Respondent's failure to produce subpoenaed information relating to its procurement of goods and services through interstate commerce, the only credible evidence presented on the issue of monetary jurisdiction was Reese's credible testimony on that that issue. (Tr. 33; GC Exh. 2.)

[6] Given the Respondent's failure to produce documentation, the record is based on Reese's credible testimony regarding the monthly expenses: ADT alarm system bill – approximately $200 a month; DirecTV bill – approximately $200 per month; Suddenlink internet bill – approximately $200 a month; online purchases at Office Depot – approximately $125 per month. (Tr. 33-36.)

directly from points outside the State of Louisiana and, thus, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

The Respondent is licensed as a behavioral health company with the Louisiana Department of Health. It is owned and operated by Dr. Angela Nichols (Nichols), Garland Smith and Jerry Brown. Nichols also owns and operates a related business, House of Hope, a therapeutic group home for boys with behavioral problems. In addition to common ownership, Respondent's facility and House of Hope were adjacent to each other.

The following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act: Angela Nichols – owner, executive director and program manager; Clarence Thomas – clinical director; and Tillman Watkins – corporate compliance officer. As executive director, Nichols oversaw child placement and employee staffing. She handled all related regulatory and contractual paperwork. Nichols was also the part-owner, executive director and program director for House of Hope.

The Respondent employed between 20 to 50 employees. The positions included the program manager, clinical manager, office manager, licensed practical nurse, file clerk, corporate compliance officer and mental health providers. There were five office staff, including Reese. Of those positions, the clinical director, the corporate compliance officer, and program manager are salaried. The remaining employees were paid hourly.[7]

Reese, an Arkansas resident, was employed initially by the Respondent as assistant office manager in March 2015. She was eventually promoted to office manager in 2016 and was supervised by Nichols. She answered the telephone, scheduled client appointments for Nichols, and processed the employee payroll for the Respondent and House of Hope. As part of her payroll duties, Reese provided employees with copies of their pay stubs.[8]

Misty Hollis was initially hired by House of Hope in 2017 as assistant manager. She was supervised by Sarah Hollis.[9] In March, Misty Hollis transferred to a direct care worker position after she and Sarah Hollis disclosed their romantic relationship. As a direct care worker, Misty Hollis reported to Nichols. She resigned in September 2019 to take another job.

On July 30, 2019, Nichols notified the Louisiana Department of Health and Behavioral Health that the Respondent was "closing its business . . . as of 7/31/2019. Seaside Healthcare

[7] Nicole Nichols, a caseworker, also functioned as assistant office manager but was not a supervisor. (Tr. 115, 117.)

[8] Although Reese obtained Nichol's approval to send pay stubs to two former employees, there is no evidence that she was required to get Nichols' approval when current employees asked for copies of their pay stubs. (Tr. 41-43.)

[9] The Respondent admitted in discovery responses in Reese's 2018 suit for overtime pay that Sarah Hollis supervised or managed employees. (GC Exh. 6 at 11.)

will take over . . . The take over date is scheduled for 8/1/2019. All client records are located at 209 West Jefferson Ave. Bastrop, La 71220 . . . I am returning the license associated with this entity license number . . .”[10]

B. Reese’s Performance History with the Respondent

Reese received six wage increases during her employment.[11] She also received annual performance evaluations. In Reese’s 2016 performance evaluation, Nichols rated Reese as a four (4), which meant Reese exceeded expectations or consistently exceeded expectations in the following categories: productivity/performance, quality, job knowledge, interpersonal teamwork, and attendance/punctuality.[12] In 2017, Nichols also rated Reese’s performance as exceeding expectations in productivity/performance, job knowledge, safety/housekeeping, and a 4.5 in attendance/punctuality.[13] Additionally, Reese received ratings of meets expectations in work quality and interpersonal teamwork.[14] In Reese’s March 3, 2018, performance evaluation, just a few months before Nichols discharged her, Nichols rated Reese’s performance as exceeding expectations in the categories of quality, job knowledge, safety/housekeeping, and attendance/punctuality, and meeting expectations in productivity/performance. The only category where Reese did not meet or exceed expectations was interpersonal teamwork.[15]

During her tenure with the Respondent, Reese was issued only one discipline.[16] In an email to Reese, Watkins and Thomas on August 21, 2017, Nichols raised concerns about “several errors in billing, and authorizations.” However, the discipline to Reese that followed indicated that Nichols mainly attributed the problem to Reese:

> Please consider this email as a verbal warning on specific job duties. It is company policy to ensure that all bills, and accounts be paid on or before schedule due dates. You have made several mistakes in regards to this manner and it is unacceptable. Please note that the next incident will result in a written reprimand and the final action will be termination. As always Healthy Minds appreciates all of your hard work and dedication.[17]

C. Reese’s Concerns About Overtime Pay

In or about June, a House of Hope employee, Sarah Hollis asked Reese to process termination paperwork for House of Hope direct care workers LeMatthew Wilson and Tyanna Jones. Later that day, Sarah Hollis also asked Reese if Nichols had the right to withhold

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[10] GC Exh. 2(b).
[11] R. Exh. 7.
[12] GC Exh. 10.
[13] R. Exh. 8.
[14] GC Exh. 9.
[15] GC Exh. 11.
[16] I did not credit Nicole Nichols’ vague testimony in response to leading questioning that the Respondent had a rule about “clocking in, clocking out” and that Reese was verbally reprimanded on several occasions for violating that rule. (Tr. 115-16.) Given the Respondent’s failure to comply with the subpoena duces tecum, it would be inappropriate to rely on such testimony.
[17] R. Exh. 8, 9 and 9(a).

paychecks from House of Hope employees until Nichols got reimbursed by the Medicaid program. Reese told Hollis she would find out.[18]

Reese promptly contacted the Wage and Hour Division of the United States Department of Labor (DOL) to inquire whether the Respondent could change employees' scheduled pay dates. Reese was informed by the DOL investigator that an employer can change a pay date at any time without advanced notice. Reese was not satisfied with that answer ("I just couldn't buy it"), so she called the Departments of Labor for Louisiana and Arkansas.[19] Someone at the Arkansas agency told her that "an employer could change a pay date if it was permanent, but not just because they're waiting on reimbursement from the insurance company." However, the Arkansas employee did not know about Louisiana's law on that issue. Reese briefed Sarah Hollis about her conversations with the regulatory agencies and the conclusion that Nichols could lawfully withhold employee wages.

Reese's mission, however, did not end there. She reached out to DOL again "because the House of Hope people worked a lot of overtime but were only paid straight time."[20] She asked the investigator "what it is we – you know, they needed to do." The investigator explained to Reese that "each individual employee would have to call to open a case."[21] The DOL investigator instructed Reese to have the affected employees contact DOL directly. After speaking with DOL, Reese went to House of Hope and spoke with Misty Hollis and Sarah Hollis. She "told" one of them to have Wilson and Jones contact her so she "could give them the investigator's number at Wage and Hour, so they could get something going with them."[22]

Wilson and Jones contacted Reese at different times, and she instructed them to call the DOL investigator to initiate wage claims. However, Reese knew that Wilson and Jones would need copies of their pay stubs in order to file wages claim with DOL. In her position, employees would regularly ask Reese for copies of their pay stubs to apply for government assistance, purchase a home, or file tax returns. After Wilson and Jones contacted her, however, Reese told Nichols that they requested copies of their pay stubs. Each time, Nichols told Reese to print and mail the pay stubs to each of them, and Reese did so.[23]

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[18] Reese was ambivalent about her discussion with Sarah Hollis: "I don't know if I called her or she called me." (Tr. 39-40.)

[19] Bastrop, Louisiana is about 20 miles from the Arkansas state line. (Tr. 40.)

[20] See Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

[21] Reese did not specify the date when she called DOL again. More importantly, her testimony indicates her second inquiry was not at the request of any other employee. (Tr. 41, 84-85.) In fact, Misty Hollis' credible testimony indicates that she rebuffed Reese's discussion about overtime pay and request to copy timesheets on July 25. (Tr. 83.)

[22] Reese was not clear as to which Hollis she was referring to when she said she "told her" to have Wilson and Jones call her "so they could get something going with [DOL]." In any event, her testimony failed to establish that either Hollis met with Reese out of concern for their own pay. Misty Hollis was asked by the General Counsel whether she "[had] any issues with not being paid overtime while working at House of Hope." She answered that "[in] the beginning, Dr. Nichols only paid straight time," but did compensate employees for overtime after Reese filed a "complaint" with the Board. (Tr. 84-85.) When construed in context with her actions on July 25, discussed below, Misty Hollis had a strong loyalty to management that made it unlikely that she would have expressed concerns over her own pay to Reese.

[23] I do not credit Reese's uncorroborated hearsay testimony that Wilson and Jones asked for copies of their pay stubs." Reese initially contacted DOL and two state agencies after Sarah Hollis asked if Nichols

On July 24, Reese received a text message on her personal cellular telephone from Nichols. After receiving the text message, Reese called Nichols and confirmed that Nichols wanted Reese to pick up the supplies for House of Hope.[24]

After picking up supplies for House of Hope on July 25, Reese called Sarah Hollis to let her know she was on the way. Sarah Hollis told Reese that she was off that day, but that Misty Hollis was at House of Hope and she let her know that Reese was on the way. When Reese arrived, Misty Hollis and some of the group home residents met Reese in the driveway to unload the supplies. Reese and Misty Hollis initially engaged in some initial banter about the supplies and the fact that Sarah Hollis was off that day. Reese then expressed her dismay with the fact that she was the only office employee who did not get a pay raise. She believed the slight was attributable to racial discrimination because she was the only white employee in the office. Reese also revealed her intention to file an unfair labor practice claim. Finally, Reese explained that she made copies of the Respondent employees' timesheets. Reese told Misty Hollis to keep copies of her timesheets because Reese researched the process for filing a third-party wage complaint with the DOL. She also asked Misty Hollis to make copies of House of Hope employees' timesheets.[25] Misty Hollis declined to do so. Reese then told Misty Hollis that Reese was sending someone into House of Hope to keep an eye on the employees. Misty Hollis told Reese that she did not want to discuss that in front of the residents.[26]

After her conversation with Reese, Misty Hollis went into House of Hope and telephoned Sarah Hollis. She told Sarah Hollis about the conversation with Reese. Sarah Hollis then relayed Misty Hollis' version of her conversation with Reese to Nichols.[27]

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could withhold pay pending Medicaid reimbursement. She was informed that Nichols could do that, but she could not file claims on behalf of others; each employee would need to contact DOL directly. After her second inquiry to DOL, Reese knew that Wilson and Jones would need copies of their pay stubs if they were going to file claims for overtime pay with DOL. It is reasonable to infer, therefore, that Reese informed Wilson and Jones about the process, which included submission of copies of their pay stubs, and they authorized Reese to ask Nichols for permission to provide them with the copies. Equally as significant, the record reveals no evidence that Nichols knew what Reese was up to when she asked for authorization to provide two former employees copies of their pay stubs. (Tr. 41-43.)

[24] Reese's testimony regarding her shopping assignment was not disputed. (Tr. 44-46; GC Exh. 3-4.)

[25] It is unclear at what point Reese learned that employees would also need copies of their timesheets in order to file claims for overtime wages.

[26] Reese and Misty Hollis gave slightly different versions of the conversation. I credited most of Misty Hollis' testimony about this encounter. Reese's version on the other hand, did not add up. She testified that she told Misty Hollis to "keep up with her timesheets, make sure to turn them in correctly, and watch her back." Reese denied asking Misty Hollis to provide copies of timesheets: "Because I did some research and found out that I could do a like third party complaint to [DOL]. And that way she would have her -- her timecards with her correct time." She said that she researched this "[b]ecause [Wilson and Jones] was having a hard time trying to get through to [DOL], and I just felt like Dr. Nichols just did not treat her employees fairly." (Tr. 46-49, 81-82, 86-87.) Reese's focus on filing a third-party complaint was inconsistent with her testimony that each employee would need to file individually. Moreover, her testimony that Misty Hollis should "watch her back" was not explained.

[27] I credit Misty Hollis' hearsay testimony that Sarah Hollis said she would report that information to Nichols. Although Sarah Hollis did not testify, the substance of her conversation with Misty Hollis was corroborated a short while when Nichols confronted Reese about those statements and, when Reese

D. The Respondent's Response to Defrese-Reese's Activities

Within 30 minutes, Nichols called Reese into Watkins' office. Thomas and Nichols were present; Watkins was not. Nichols asked Reese if she was compiling documents to make a claim against her. Nichols also asked Reese if she was stealing timesheets in order to file a claim with the DOL. Each time, Reese answered no. Nichols asked Reese if she wanted Misty Hollis to come to the meeting. Reese agreed and Nichols summoned Misty Hollis to the office. Nichols asked Misty Hollis about her conversation with Reese that morning. Misty Hollis told Nichols that Reese complained about "everyone in the office getting a raise but her, and that [Reese] thought it was a race issue." Misty Hollis also told Nichols that Reese said she had been making copies of employees' timesheets. She added that Reese asked her to make timesheets of House of Hope employees and she declined. Reese denied making copies of employees' timesheets and called Misty Hollis a liar. Reese admitted, however, that she told Misty Hollis about suing for racial discrimination because she did not get a raise. Nichols said she knew Misty Hollis was telling the truth because she would not have known about the raises in the office.[28] Nichols then discharged Reese.[29]

E. Reese's Other Post-Discharge Actions

After she was discharged, Reese filed a claim for unemployment benefits. The denial of the claim by the Louisiana Workforce Commission on August 22, which Reese appealed, was based on the following determination:

> You were discharged from your employment because of your failure to abide by company rules/policies. You were aware of these rules/policies. Your discharge was for misconduct connected with the employment.[30]

Reese had a better result recovering overtime wages. On August 30, Reese, Wilson, and Jones filed a collective complaint for unpaid overtime against the Respondent in the United States District Court in the Western District of Louisiana. On August 3, 2020, United States

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denied making them, summoned Misty Hollis to confirm them. (Tr. 82-83.)

[28] Reese and Misty Hollis provided generally consistent versions as to what was said during this meeting. (Tr. 49-51, 83-84, 112.)

[29] The Respondent's deliberate noncompliance with the subpoena duces tecum for company documents, including rules and policies, warrants appropriate sanctions. Watkins testified credibly regarding the Respondent's alleged custom and practice of counseling employees for minor infractions and issuing written reprimands for more serious infractions and/or action plans. (Tr. 106-09.) Coupled with the lack of evidence as to the level of misconduct that would justify termination, the Respondent's failure to provide copies of its rules and policies warrants an inference that the Respondent had no rules or policies relating to termination.

[30] I gave the Louisiana agency's determination no weight. The Respondent asserts that the denial of unemployment benefits was "because they found out . . . the reason was a policy that she was aware of rules and policy. She was discharged for misconduct connected with employment." (R. Exh. 4.) Once again, the Respondent's failure to comply with the subpoena duces tecum, including company rules and policies, warrants a finding that there were none.

district judge Terry A. Doughty issued a ruling granting a motion for summary judgment in part and requiring Respondent pay Reese, Wilson, and Jones unpaid wages.[31]

LEGAL ANALYSIS

The General Counsel alleges that Nichols, the Respondent's co-owner and program director, violated Section 8(a)(1) of the Act on July 25 in two respects. In the first instance, Nichols allegedly questioned Reese and Misty Hollis in another manager's office about their protected concerted activities relating to overtime pay and Reese's allegations about racial discrimination. Shortly thereafter, Nichols discharged Reese after Misty Hollis confirmed Reese's statements related thereto. The Respondent did not dispute interrogating Reese and Misty Hollis about those remarks but contends that Reese was lawfully discharged because she violated company rules.

A. Nichols' Interrogation of Employees on July 25

In determining whether questioning amounts to unlawful interrogation, the Board considers whether the employer interfered, restrained or coerced employees in the exercise of their Section 7 rights. *EF International Language Schools*, 363 NLRB No. 20 (2015). Specifically, the Board evaluates (1) the nature of the information sought; (2) the identity and rank of the questioner; (3) the place and method of the interrogation; (3) whether it creates "an atmosphere of unnatural formality;" and (4) "the truthfulness" of the replies when determining whether the questioning of an employee constitutes an unlawful interrogation). *Westwood Health Care Ctr.*, 330 NLRB 935 (2000).

There is no doubt that Nichols, the program manager and co-owner, summoned Reese and then Misty Hollis to a hastily convened formal meeting in another manager's office. Once there, Nichols questioned both about Reese's earlier comments to Misty Hollis. Nichols asked them if it was true that Reese complained about being racially discriminated against with respect to pay raises. She also asked whether Reese copied other employees' timesheets and asked Misty to make copies as well. Reese admitted her intention to bring a legal action for racial discrimination. However, she called Misty Hollis a liar and denied making unauthorized copies of employees' timesheets or asking Misty Hollis to do the same.

Nichols inquiry into Reese's accusations of racial discrimination addressed a matter unique to Reese – she was the only one alleging such treatment. There was no group concern at issue there. Nichols' questioning about the timesheets, on the other hand, related to overtime wages, an issue affecting the hourly employees. Reese "told" either Misty Hollis or Sarah Hollis to have former House of Hope employees Wilson and Jones contact her so she "could give them" the DOL investigator's number "so they could get something going with them." She then asked Nichols for permission to send them copies of their timesheets in order to file their claims. Nichols authorized Reese to mail Jones and Wilson their timesheets. As such, Reese's advocacy on their behalf qualified as protected concerted conduct since it related to a term and condition of employment – wages – and was "engaged in with or on the authority of other employees, and not

[31] GC Exh. 5-6.

solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB, 493, 497 (1984). That sequence of events, however, is not what the July 25 meeting was about.

Nichols' inquiries at the July 25 meeting were not about Reese's copying of timesheets for former employees Wilson and Jones, which Nichols authorized. Nor were they about the sequence of events where Reese initially contacted DOL at Sarah Hollis' request regarding the withholding of pay for Jones and Wilson. Nichols' interrogation related to Reese's copying of timesheets in order to file future claims for overtime pay with DOL. The problem with that issue, however, is that there is no record of other employees expressing concern to Reese about overtime wages. Misty Hollis eventually enjoyed the fruits of Reese's campaign to recover overtime owed the hourly employees. However, her gratitude for Reese's efforts certainly was not evident when she immediately reported Reese's comments to Sarah Hollis, who in turn immediately notified Nichols. Misty Hollis' spontaneous reaction revealed an obvious loyalty to management, making it unlikely that she would have previously expressed concern to Reese over her own overtime wages.

Under the circumstances, Nichols' interrogation on July 25 was lawful because it addressed matters particular to Reese, not subjects of group concern. See *Meyers Industries, Inc.,* 281 NLRB 882, 887 (1986) (Meyers II), aff'd sub nom, Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987) (concerted conduct includes instances in which an individual employee brings group complaints to the attention of management); *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992) citing *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (conduct is concerted where the evidence supports a finding that the concerns expressed by the individual are the logical outgrowth of the concerns expressed by the group); *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014), citing *City Disposal Systems*, 465 U.S. 822, 831 (1984) (concerted conduct must be linked to the actions of coworkers). Accordingly, this charge is dismissed.

B. Reese's Discharge on July 25

In order to prove the Respondent unlawfully discharged Reese on July 25, the General Counsel must show that an employee's protected concerted activity was a motivating factor in an employer's decision to take adverse action against the employee. The General Counsel meets this burden by showing that the employee engaged in protected concerted activity, and the employer had knowledge of, and harbored animus against, such activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1 (2019) ("evidence of animus must support finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee.") If the General Counsel establishes those elements, the burden shifts to the employer to affirmatively prove that the same action would have taken place absent the protected activity. *Donaldson Bros Ready Mix, Inc.*, 341 NLRB 958, 961, 965 (2004) (employer had not sent employees home early or prohibited them from clocking in early at any time during the previous nine years and did not establish a business reason for doing so now).

Nichols discharged Reese almost immediately after learning on July 25 that Reese told Misty Hollis that she (1) intended to take legal action due to racial discrimination in the award of pay raises and (2) was copying employees' timesheets and asked Misty Hollis to do the same in

order to facilitate the filing of a collective action for overtime wages. Moreover, the Respondent's subsequent reasons for terminating Reese – problems with clocking-in and clocking-out and a vaguely characterized failure to comply with company rules – were inconsistent with those expressed by Nichols on July 25 (copying or stealing timesheets and badmouthing the company). See *Lucky Cab Co.*, 360 NLRB 271, 274 (2014) (shifting explanations for adverse action indicates pretextual reasoning); *In re Medic One*, Inc., 331 NLRB 464, 475 (2000) (animus towards protected remarks demonstrated by suspiciously close timing of, and the admitted, shifting and unsubstantiated reasons for, the discharge). Those facts also preclude the Company from meeting its burden of establishing that it would have acted in the same manner absent the activity. See *Parkview Lounge, LLC d/b/a Ascent Lounge*, 366 NLRB No. 71 slip op. at 10 (2018) (inconsistent or shifting reasons alleged for discharge two days after the concerted protected activity were mere pretext to mask unlawful motive).

As previously discussed, however, the record is devoid of credible evidence that Reese's protected conduct on July 25 was "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee [herself]." *Meyers Industries*, above. Reese did engage in protected concerted conduct on behalf of former employees Jones and Wilson with respect to the issuance of their final paychecks and then assisted them in filing claims for overtime wages – all prior to July 25. She also admitted that she intended to file a legal action for racial discrimination. Those facts and circumstances alone, however, do not alleviate the General Counsel's burden to establish that Reese's protected activity was in concert with concerns expressed to her by other employees. Here, there was clear and consistent evidence that Reese was the advocate for all the hourly employees but there was no linkage to group action. See *Ewing v. NLRB,* 861 F.2d 353, 357 (2d Cir. 1988) (action is "concerted" if an individual act has "some demonstrable link with group action"); *NLRB v. Caval Tool Div*., 262 F.3d 184, 190 (2d Cir. 2001) (intent to initiate group action can "be inferred in the context of a group meeting held to discuss the terms and conditions of employment"). Lacking proof of that first element of the *Wright Line* analysis, the charge for unlawful termination is also dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Healthy Minds, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Reese engaged in protected activity on July 25, 2018 when she informed Misty Hollis of her intention to file a legal action against the Respondent for racial discrimination.

3. Reese engaged in protected activity on July 25, 2018 when she informed Misty Hollis that she made copies of employees' time sheets and told Misty Hollis to keep copies of her timesheets because Reese had done some research about filing a third-party wage complaint with the United States Department of Labor.

4. Reese's protected activities on July 25, 2018 were not concerted and, therefore, it was not proven by a preponderance of the evidence that the Respondent unlawfully interrogated Reese and Misty Hollis, and then discharged Reese in violation of Section 8(a)(1) of the Act.

On these Findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

The complaint is dismissed.

Dated: Washington D.C.
December 21, 2020

Michael A. Rosas
Administrative Law Judge